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APPELLANT PRO-SE:

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**IN THE  
COURT OF APPEALS OF INDIANA**

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KURT VINING,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 02A03-0602-PC-67
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

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APPEAL FROM THE ALLEN CIRCUIT COURT  
The Honorable Thomas J. Felts, Judge  
Cause No. 02C01-0512-MI-208

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**September 14, 2006**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAKER, Judge**

Appellant-petitioner Kurt Vining appeals the denial of his petition for post-conviction relief. Specifically, Vining claims that he is entitled to relief because the State failed to bring him to trial for various offenses within one year as required by Indiana Criminal Rule 4(C).<sup>1</sup> Concluding that Vining's petition for post-conviction relief was properly denied, we affirm.

### FACTS

In March 1998, Vining was charged under cause number 02C01-9803-DF-83 (the DF-83 case) with operating a motor vehicle while intoxicated (OWI) as a class D felony and several other offenses in Allen County. On June 1, 1998, Vining was charged with a second OWI as a class D felony and other related offenses under cause number 02C01-9806-DF-147 (DF-147 charge). Vining remained at large between 1998 and 2003, and the trial court issued arrest warrants in both cause numbers after Vining had failed to appear for scheduled hearings.

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<sup>1</sup> This rule provides that:

No person shall be held on recognizance or otherwise to answer a criminal charge for a period in aggregate embracing more than one year from the date the criminal charge against such defendant is filed, or from the date of his arrest on such charge, whichever is later; except where a continuance was had on his motion, or the delay was caused by his act, or where there was not sufficient time to try him during such period because of congestion of the court calendar; provided, however, that in the last-mentioned circumstance, the prosecuting attorney shall file a timely motion for continuance as under subdivision (A) of this rule. Provided further, that a trial court may take note of congestion or an emergency without the necessity of a motion, and upon so finding may order a continuance. Any continuance granted due to a congested calendar or emergency shall be reduced to an order, which order shall also set the case for trial within a reasonable time. Any defendant so held shall, on motion, be discharged.

(Emphasis added).

At some point in 2003, Vining returned to the jurisdiction and pleaded guilty to the OWI charge and a class C misdemeanor offense of refusal to identify on September 22, 2003 under the DF-83 case. That same day, Vining also pleaded guilty to OWI in the DF-147 case. The trial court then sentenced Vining to three years on the OWI charge and to sixty days on the refusal to identify offense in the DF-83 case. Vining was also sentenced to a suspended term of three years on the DF-147 case that was ordered to run consecutively to the sentence imposed in the DF-83 case. Vining was placed on probation in both cases.

Thereafter, on September 16, 2004, Vining's probation was revoked in the DF-83 case and the trial court ordered him to serve the three-year sentence that originally had been suspended. On November 18, 2004, Vining's probation was revoked in the DF-147 case, and he was ordered to serve the three-year suspended sentence on November 29, 2004, under that cause number. In sum, by November 2004, Vining's probation had been revoked in both causes, and the trial court ordered him to serve the entire six-year sentence that had been originally suspended.

On September 23, 2005, Vining filed a "Verified Petition for Writ of Habeas Corpus" (the Writ) in the Miami Circuit Court, alleging that his convictions were improper under both cause numbers because the State had failed to bring him to trial within one year pursuant to Indiana Criminal Rule 4.<sup>2</sup> Appellant's App. p. 9-13. Specifically, Vining alleged that the

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<sup>2</sup> On November 28, 2005, the Writ was transferred to the Allen Circuit Court, the county in which Vining was convicted and sentenced, and assigned Cause Number 02C01-0512-MI-208 (the MI-208 case) on December 2, 2005. As the case was not assigned a post-conviction cause number, the Clerk's docket in this case reflects a civil number rather than a post-conviction cause number.

State was barred from prosecuting him for the offenses because more than one year had passed between his arrests in 1998 and his guilty pleas in 2003. Following a hearing on December 27, 2005, the trial court denied the Writ. In its order, the post-conviction court specifically found that the Criminal Rule 4(C) time period had tolled during Vining's absence from the jurisdiction between 1998 and 2003. Specifically, the post-conviction court determined that "the State has satisfied its burden under Criminal Rule 4, the time to prosecute was tolled as of that date and then properly resurrected upon [the] arrest on the warrant." Tr. p. 9. Vining now appeals.

## DISCUSSION AND DECISION

### I. Standard of Review

Before proceeding to the merits of Vining's claims, we initially observe that the petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); McCarty v. State, 802 N.E.2d 959, 962 (Ind. Ct. App. 2004), trans. denied. When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. Id. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Id. Post-conviction procedures do not afford petitioners with a "super appeal." Richardson v. State, 800 N.E.2d 639, 643 (Ind. Ct. App. 2003). Rather, they create a narrow remedy for subsequent collateral challenges to convictions that must be based upon grounds enumerated in the post-conviction rules. Id.; see also P-C.R. 1(1).

## II. Vining's Claim

In resolving Vining's claim that he was entitled to post-conviction relief because the State did not bring him to trial within one year as required by Criminal Rule 4(C), we first note that he failed to present any evidence in support of his claim for relief. In particular, Vining did not introduce the record of proceedings from either cause number into evidence. Thus, the post-conviction court had no evidence before it to evaluate Vining's allegations. As a result, Vining has waived his claims, and the post-conviction court properly denied his request for relief on this basis. See Tapia v. State, 753 N.E.2d 581, 588 (Ind. 2001) (finding that because the petitioner wholly failed to present any evidence in support of his petition, the post-conviction court properly denied his request for relief).

Also, as noted above, Vining pleaded guilty to both offenses. Appellant's App. p. 18-19, 28. This court has held that when a defendant pleads guilty, he or she cannot question pretrial orders after a guilty plea is entered. Cornelious v. State, 846 N.E.2d 354, 357 (Ind. Ct. App. 2006), trans. denied. Here, Vining does not allege that his guilty plea was not voluntary or that his counsel was ineffective in relation to the Criminal Rule 4(C) issue. To be sure, Vining only alleged that he could not be prosecuted in 2003 because the one-year period set forth in Criminal Rule 4(C) had expired. Hence, Vining is precluded from collaterally attacking his convictions following his guilty pleas to these offenses. See Barnett v. State, 637 N.E.2d 826, 830 (Ind. Ct. App. 1994) (holding that by pleading guilty, the defendant waived his right to trial including the right to a speedy trial). For this additional reason, Vining's petition for post-conviction relief was properly denied.

The judgment of the post-conviction court is affirmed.

VAIDIK, J., and CRONE, J., concur.